EMPLOYMENT TRIBUNALS

Claimant: Mr J Thornhill

Respondent: London Borough of Camden

Heard at: London Central **On:** 10-12 July, 5 and 6 October 2018

Before: Employment Judge K Welch (sitting alone)

Representation
Claimant: Mr D O'Dempsey, Counsel
Respondent: Mr S Sudra, Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal is well founded and succeeds.

2. The case will be listed for a remedy hearing on 8 January 2019, should the parties be unable to reach agreement on quantum.

REASONS

1. This is a claim for unfair dismissal brought by the Claimant, Mr Thornhill, against his former employer, the London Borough of Camden relating to his summary dismissal on 4 September 2017.
2. I was provided with an agreed bundle, and page references in this Judgment refer to that bundle.
3. The Respondent sought to adduce an additional document, which was partly redacted and which had only just come to light the evening before the Tribunal hearing. Counsel for the Claimant objected and stated that this document should not be redacted. Counsel for the Respondent agreed to this, and subsequently provided clean copies of the document, which was added to the agreed bundle.
4. Counsel for the Claimant also raised a further, more general, concern that a number of documents within the agreed bundle had been redacted to such an

extent that they could not sensibly be considered. Having looked at these documents (for example pages B90 and B91), they only showed the heading of the document and nothing else. The Respondent stated that the reason for the redaction was either legal privilege, or confidentiality due to the commercial sensitivities of the contents of the documents. I made clear to the parties that the failure by the Respondent to produce legible copies of relevant documents may affect deliberations concerning the reasonableness of the Respondent's investigation, including whether it was insufficient.

5. In accord with the overriding objective, it was agreed that it was appropriate that the hearing continue. The Respondent had been given ample opportunity to include appropriate documents relevant to the agreed issues and, should they not be legible, would be unable to rely upon that evidence.

6. It was agreed that the Claimant was dismissed for one of the potentially fair reasons, namely conduct. Therefore, the issues were agreed as follows:

    a. Was it reasonable for the Respondent to treat the Claimant's conduct as misconduct?
    b. If so, was the misconduct sufficient so as to be reasonably regarded as gross misconduct?
    c. Was the sanction of summary dismissal within the band of reasonable responses by the employer given its state of knowledge at the time of the dismissal?
    d. Did the Respondent conduct a fair and adequate investigation and base its conclusion on evidence?
    e. Did the Respondent follow its own disciplinary policies and procedures?
    f. Was a fair process followed in reaching the decision to dismiss?
    g. Was a fair process followed in conducting the appeal against dismissal?
    h. Even if a fair procedure had been followed would the Claimant have been dismissed in any event?
    i. Did the Claimant's conduct contribute to his own dismissal?

    Factual issues

    j. Did the Council flout its own disciplinary policy in adjourning its own proceedings to allow for deliberation?
    k. Was the hearing of the disciplinary hearing in the absence of the Claimant or representation a breach of the Respondent's own policies, or a breach of natural justice?
    l. Should the Claimant's mitigating circumstances have been given more weight in deciding whether or not to proceed in his absence bearing in mind the seriousness of the allegations and the potential consequences to the Claimant?

m. Was the Claimant given clear and particularised allegations of the alleged breaches of the Respondent's policies so as to allow him a fair opportunity to answer the allegations?

n. Did the appeal fail to recognise relevant contradictions between the audit report/ investigation and the decision to dismiss?

o. Did the Respondent's investigation reports in fact support the allegations upon which his dismissal was based?

p. Was the Respondent's decision to dismiss supported by material derived from its own internal audit report and investigation interviews when read in the context of its own code of conduct?

q. Did the Respondent base its decision to dismiss upon evidence and a reasoned interpretation of its own rules and policies?

r. Did the Respondent treat the Claimant differently from other employees in relation to the allegations of misconduct that it found to be proved?

7. Witnesses provided statements and were cross-examined and subject to questions from me. The Respondent called 5 witnesses and the Claimant 2 (including himself). Therefore, I heard evidence from:

a. Mr Jeff Cross – Senior Principal Investigator in the Internal Audit Team;

b. Annmarie Conners – Head of Procurement

c. Katherine Anne Robertson – Director of Customer Services

d. Angela Mason – Councillor for LBC

e. Emma O'Brien – Senior HR Advisor;

f. The Claimant himself; and

g. Mr Terrence John Conner – former work colleague of the Claimant for 25 years.

Findings of Fact

8. The Claimant was employed by the Respondent from 17 July 1980 until his summary dismissal on 4 September 2017. His role at the time of his dismissal, and at all material times, was Street Lighting and Drainage Manager. Other than one written warning for misconduct dated 21 September 2000, which had long since expired, the Claimant had no other warnings during his employment with the Respondent.

9. The Claimant received no formal training in respect of the handling of tenders, as confirmed by Mr Connor and the Claimant himself, and which was not disputed by the Respondent. However, the Respondent contended that, as the Claimant had been involved in many such tenders, he understood the legal requirements involved. The Claimant's evidence, which I accept, was that his involvement in previous tenders was limited to selecting contractors to go through to the tendering stage and/or to provide technical advice. The Claimant said that he

had never been involved in the evaluation of tenders and had not been involved in such a large tender as the exercise in 2015 referred to below.

10. The Respondent did not have a set of procedures or rules concerning the tendering process at the relevant time.

Public Realm Maintenance and Improvement Contract

11. The Respondent put out a tender for a new Public Realm Maintenance and Improvement contract ('the Contract'), which was due to commence in 2015. One element of this contract was street lighting, and the Claimant was the lead professional on the specification of street lighting works. This meant that his involvement was to collate the quantities of what was required, with John Skinner, an external consultant, to put into the tender document, so that tenderers could give pricing against these required amounts.
12. The Respondent had a purchasing system called Symology, which it used to try and predict future requirements for the purposes of tendering based on what had been used in the past. This system, which generated a code for use in the tenders, did not work properly for the Contract and the IT department was unable to resolve this due to long term sickness absence. This was subsequently confirmed during Mr Cross's audit investigation after the tender process had been completed for the Contract.
13. The Claimant's son was involved in a catastrophic road traffic accident on 2 September 2015, which ultimately resulted in the Claimant's son having his lower leg amputated on 23 October 2015. The Claimant continued to work but he contended that his ability to concentrate was seriously adversely affected.
14. On 10 September 2015, the Claimant requested to be excused from being involved in the tender process. His boss, George Loureda, who he initially spoke to concerning his request, told him to send an email to the project managers. Therefore, when replying to an invitation request for a meeting on the tender project, the Claimant sent a response to Martin Reading, Iona Goodchild and David Wells [page B37] saying:

    "*Hi Iona I am sorry to have to inform you that due to a serious accident my son has been involved in I will not be part of the tender evaluation panel*."
15. The Respondent sought to suggest that the Claimant was only requesting to be excused for one meeting, since the response was to a meeting request. I do not accept this, particularly in light of the Claimant's evidence that he had spoken to George Loureda before sending the email to confirm that he did not wish to be part of the whole tender process. Also, the email response to the appointment is not limited in any way to the particular appointment he was requested to attend. I accept, therefore, that the Claimant requested to be removed from the tender process completely and was verbally told that he could not be excused, following

his email request, as he was the only person who knew anything about street lighting.

16. It was clear from the uncontested evidence of the Claimant that throughout September and October 2015, the Claimant's son underwent 5 operations. On 6 November 2015, an embolism/ blood clot was found in his lung and he had an emergency blood transfusion on 11 November 2015. This was during the period that the tenderers for the Contract submitted their prices and the Respondent reissued its price list requirements on a number of occasions. The final price list submission by those tendering for the Contract took place on 11 November 2015.
17. Following October 2015, it was clear from the Claimant's evidence, which again was not disputed by the Respondent, that the Claimant was actively involved in numerous hospital/ physiotherapy appointments with his son. The Claimant considered that, with hindsight, he should not have been at work, since his mind was "all over the place".
18. During the tender process, there were problems with the amount of streetlighting requested as part of the tender exercise.
19. The Claimant's superior, who headed up the tender for the Contract, Iona Goodchild, sent to the Claimant the pricing document submitted by one of the tenderers ('VH') on 1 October 2015. The Claimant queried whether he should be given this information with Martin Reading, who confirmed that providing he did not disclose this information to anyone outside the panel, as VH were their current contractor, there was no problem with the Claimant having this information.
20. As a result of this document being sent, the Claimant revised the amounts of street lighting required for the Contract, which was to be inserted into a new tender document.
21. The new tender document was sent out on a few further occasions to the companies tendering for the Contract, who then had to submit their prices against the revised documents.
22. Iona Goodchild again emailed the Claimant on 6 November 2015 [page B102] attaching VH's bid submission prices. She asked the Claimant to review the quantities to get them closer to the Respondent's budget. The email confirmed that the rates submitted by VH were confidential. The Claimant replied on the same day, saying:

    "*I have reviewed 1300 and 1400 series and highlighted any chan[g]es in Red if you want me to look at anything else can you let me know asap as I need to get away. Can you confirm that I can now delete this spreadsheet.*"
23. The Claimant gave evidence, which I accept, that the reason he requested to delete the spreadsheet was due to another of the contractors ('FMC') having

gained access to documents attached to an outlook appointment, which the Claimant believed meant that they were able to access outlook email accounts. However, despite the Claimant's request, this email and spreadsheet were never deleted by the Claimant.

24. The tenderers for the Contract submitted their final price list on 11 November 2015. The Contract was finally awarded to VH on 10 December 2015.
25. The amendments made by the Claimant had the effect of providing VH with an advantage, since, as requested by Iona Goodchild, the most expensive elements of VH's tender bid were reduced. The Contract was therefore awarded to VH, although the Claimant was not involved in the final evaluation process and was not part of the decision making panel deciding on who the Contract was awarded to.
26. FMC challenged the tender process. Ultimately, there was a legal challenge brought by this unsuccessful contractor in the civil courts concerning the award of the Contract to VH. Following an initial investigation, including speaking with a number of individuals involved in the tendering process, including the Claimant, the Respondent originally defended the claim. However, having appointed independent external legal counsel, and having carried out disclosure of relevant documents for the purposes of the proceedings, the advice from external legal counsel changed. This advice suggested that the Respondent should settle the claim due to pricing having been shared by Council officers during the tender process, which was the pricing information given by Iona Goodchild to the Claimant referred to above. The challenge brought by FMC was therefore settled for a substantial six-figure sum.
27. This legal advice appears to have been key to the investigation that was subsequently carried out, since it formed the basis for the allegations against the Claimant. Although, the advice was not provided by the Respondent as part of its evidence for the Tribunal hearing, and further, has never been provided to the Claimant, there were references to it, and quotations from it, within the subsequent report prepared as part of an investigation by the Respondent's auditors.
28. The legal advice was provided by external counsel. The Claimant had an internal meeting and a subsequent phone call with a member of the Respondent's legal team for the civil case, but could not remember their name. He did not see the statement, which was prepared from this meeting dated 12 October 2016 [pages B68 to B70] or the notes from the phone call on 31 October 2016 [pages B70-73]. From these, it shows that the Claimant was asked at page B72 "*Looks like IG has sent JT [VH] price list from their 19 October submission. Does JT remember being sent the price list? No, doesn't remember, not saying that IG*

didn't send the price list, of course she did." And, "*JT asked if he could delete the spreadsheet. The reason he said this is that he didn't want anything on his computer in case anything went wrong.*"

29. The Claimant was clear that he had never had an investigatory meeting with internal/ external legal counsel, and had only attended meetings where others also attended to understand what had gone wrong with the tendering process for the Contract.
30. Mr Jeff Cross and Mr Manjeet Bhania were requested to undertake an audit investigation in November 2016. This was said to be a two pronged approach, whereby Mr Bhania would consider the procurement controls (ie systems in place) and Mr Cross would investigate whether there had been any fraud or corruption involved in the Contract procurement process. It is clear that the Claimant was only informed that the reason for the investigations was to identify what had gone wrong during the tender process for the Contract in order to identify issues so that this would not happen again.
31. There were no documents disclosed which provided any specific terms of reference, and it was accepted by Mr Cross that he did not make clear to the Claimant that he was investigating him for fraud and/or corruption. Mr Cross also confirmed in cross examination that he at no time put to the Claimant that he was under investigation for dishonesty for failing to disclose that he had received pricing information during the Contract tender process.
32. Mr Cross confirmed that the Claimant met with him and Mr Bhania on a number of occasions. It appeared that the Claimant cooperated throughout the investigation before he went off on long term sick for depression in mid-March 2017, later diagnosed as post traumatic stress syndrome.
33. Once the Claimant went off sick, Mr Cross did not attempt to meet with him again. Mr Cross's evidence during cross examination was that this was due to the Claimant having threatened violence against his manager, and that he was prone to bouts of anger. However, there was no evidence to corroborate this and it did not form part of Mr Cross's statement. The Claimant confirmed in cross examination that he had had a heated discussion over the telephone with David Wells, but it was clear that no action was taken concerning this and I therefore do not accept that this was the reason for no one attempting to contact the Claimant whilst off sick to investigate this matter.
34. The emails concerning price sharing from Iona Goodchild to the Claimant were identified during Mr Cross's investigation, along with emails concerning the acquiring of rugby tickets by an individual from VK from one of the Claimant's contacts, during the tender process for the Contract. He was not involved in the transaction for the tickets and did not benefit from this.

35. Mr Cross's investigation involved meeting a number of staff, although he gave evidence that not all of these meetings were minuted. I find that highly unlikely for someone trained to carry out such investigations. There were meeting notes for only one of the Claimant's meetings with Mr Cross/ Mr Bhania, despite there being approximately 5 meetings which took place. When the Claimant received the report, it did not contain copies of the witness statements/ meeting notes, which Mr Cross had taken as part of his investigation. The Claimant finally obtained witness statements for 2 witnesses only by virtue of making a subject access request, and these were very heavily redacted [pages B79-83 and B90-91] to such an extent as to prove useless.
36. The report prepared by Mr Cross relied heavily upon what legal counsel had found in conducting its preliminary investigations into the tender process for the legal challenge. The Claimant gave evidence that he had not been interviewed by the Respondent's in-house legal counsel, although accepted that he had attended meetings with them and others.
37. Mr Cross's report, at paragraph 3.19 states:

    "*Quite clearly, JT had doubled the quantities and has failed to grasp the concept of the quantity bands. JT's explanation as to these events is extremely sketchy.*"
38. There were further extracts within Mr Cross's report from Counsel's advice, which included the following:

    "*We note that Mr Thornhill's recollection of these matters is very shaky, particularly of the timings and the reasons for the various reissues and changes to the Price List. We understand that this is due to personal events at the material time relating to a serious accident suffered by his son, and set out matters concerning this no further than is necessary below." …. "… it was obvious to Mr Thornhill (from his reference to the deletion) that what was going on here was suspect."* [Page B103].

    The report went on to say that, "*JT did not inform anyone at any stage during this process that VH's prices had been shared with him. This contributed to the continual rebuttal of the challenges presented by FMC."*
39. The conclusions of Mr Cross's report included findings that:

    "*4.3 JT's recollection of events is inconsistent and is described by Counsel as 'very shaky, particularly of the timings and reasons for the various reissues and changes to the price list.'……*

    "4.5 JT failed to inform Legal or management that the VH's pricing had been shared."…..

    "4.7 JT appears to have provided rugby tickets to Dave Easton, VH Lighting Manager, during the procurement process." [Page B106]
40. The report went on to recommend that consideration should be given to

disciplinary action against the Claimant.

41. Ms Annmarie Conners, who had been recruited in October 2016 as Head of Procurement for the Respondent, was asked by the Respondent's Human Resources department in April/ May 2017 to present the management case at the Claimant's disciplinary hearing, alongside the Internal Audit review. She prepared a disciplinary investigation report [Pages B138-143].

42. It was clear that this disciplinary investigation report relied heavily upon the Audit report of Mr Cross and in evidence she confirmed that Mr Cross's report was her "main source of reference and information". It appeared to me that no further investigation took place.

43. The Claimant was invited to attend a disciplinary hearing by letter dated 3 May 2015 [pages B110-111] concerning, "*allegations against you of gross misconduct relating to dishonesty (section 8 of the Code of Conduct), and failure to meet your responsibilities as an employee (section 4.1).*" The letter gave the right to be accompanied by a trade union representative, someone from an employee group or a work colleague. The letter suggested that due to his sickness absence, he could participate by telephone or video call and have his representative attend in person. Further, it confirmed that dismissal was a potential outcome.

44. This hearing was postponed. The Claimant was invited by letter dated 13 June 2017 to attend a further disciplinary hearing [pages B125-126]. The Claimant's wife responded to the letter by email of 14 June [pages B129-130], which confirmed that the Claimant was not fit enough to attend this hearing, but would attend when he was fit enough to do so. She stated that there were, "*inaccuracies in other allegations by Mr Cross which he will need to substantiate..".*

45. The Respondent confirmed that the hearing would go ahead, but that written submissions could be made, should the Claimant wish to. The Respondent did not ask what the inaccuracies were. The disciplinary hearing did not go ahead due to the Respondent's need to postpone. Therefore a further invitation letter was sent to the Claimant on 23 August 2017 inviting him to a disciplinary hearing on 31 August 2017.

46. The hearing was chaired by Katherine Robertson. Annemarie Conners presented the management case and Jeff Cross was called as a witness. The 3 main allegations were not set out fully in the invitation letter, rather, the allegations formed part of the disciplinary report and were stated to be:

a. Mis-representing events when questioned whether he had knowledge of commercial information that impacted on the tender;

b. Failure to inform legal or management of his actions in the sharing of information; and

c. Failure to register contact regarding hospitality whilst engaged in a large tender process.

47. Ms Robertson used the internal Audit report as (in her words): "*an accurate reflection of events to make a number of findings to help me arrive at my decision.*"

48. The Claimant did not attend the disciplinary hearing due to his ill health. The Occupational Health report [pages C2-3] confirmed that the Claimant was not well enough to attend a meeting with his line manager (or indeed communicate with him) and could not attend a disciplinary hearing "*at present*". It referred to his "…*struggling with concentration, focusing, making decisions and with his memory*". However, it stated that he may be able to make a written submission or nominate a representative to attend, although this would be Mr Thornhill's decision.

49. Ms Robertson found all allegations to be proven, although felt the first 2 allegations constituted gross misconduct, and the third allegation (the sourcing of rugby tickets) misconduct. She considered that the Claimant had had multiple opportunities to be open and honest about the sharing of pricing information. Also, when specifically asked by Iona Goodchild in January 2016 whether she had shared pricing information with him, the Claimant answered no. It was difficult to understand where this information had come from, since it does not appear in Jeff Cross's audit report or the investigation report by Annmarie Conners.

50. Having looked at emails, which did not form part of the original bundle of documents, but were handed in just prior to Mr Cross's evidence, there is an email exchange between Amina Hossain, Lawyer and Iona Goodchild and Mr Thornhill [pages E2 to E5]. Mr Sudra could not confirm whether or not these documents had been taken into account when the decision was taken to dismiss the Claimant. In this exchange, Ms Goodchild refers to the Claimant as not having submitted price lists until very recently, which the Claimant responded to by saying "*What you are saying is fine with me and I can confirm to everyone that my recollection was that nobody saw prices?…".* The Claimant in his evidence, confirmed that he meant that nobody else saw VH's prices other than himself and Martin Reading, who he had asked whether he was allowed to be sent the pricing.

51. Ms Robertson adjourned the disciplinary hearing so that she could investigate whether the Claimant's son's accident could have impacted on his ability to fulfill his role. Therefore, she asked George Loureda if the Claimant had raised any concerns with him or his line manager that he wasn't coping with the role and the procurement process after his son's accident [page B154]. He replied verbally

that the accident was very serious and caused considerable anxiety and stress, but that his main request was flexibility to take time off to support his son at appointments.

52. The Claimant considered that the adjournment, without informing him that there was one, was a breach of the Respondent's own procedures. Having looked at the disciplinary procedure, I do not find that failing to inform the Claimant about the adjournment was such a breach.

53. Therefore, Ms Robertson decided to dismiss the Claimant with immediate effect. The letter of dismissal was sent to the Claimant on 4 September 2017 [pages B159-160], which enclosed a summary of what Ms Robertson had taken into account [pages B155-158]. These included the following:

a. The Claimant had "multiple opportunities" to be open and honest about the sharing of pricing information;

b. His representation of events was described as sketchy;

c. Whilst not formally interviewed due to ill health, the internal report was sent in May 2017 and no response to the serious allegations had been received;

d. The Claimant's wife's emails/ evidence;

e. The impact of the Claimant's son's accident on his ability to fulfill his role;

f. Whether length of time could be a reason for lack of memory;

g. The impact of the Claimant failing to advise management of the truth.

54. The Claimant appealed against the decision to dismiss him by letter dated 15 September 2017 [pages B163-166].

55. The Respondent's procedures provide that an appeal can only be made on one of four grounds:

a. A failure to follow procedure;

b. A decision about a significant fact which it was not reasonable to make;

c. No reasonable person could have come to the outcome;

d. New evidence.

56. His appeal hearing was heard on 13 February 2018 by a panel chaired by Angela Mason, a Councillor of the Respondent. This was not a re-hearing of the original case, as outlined in a letter to the Claimant from the Respondent dated 30 January 2018. The appeal decision was sent by letter dated 21 February 2018. The appeal upheld Katherine Robertson's (referred to as Kate Robinson in the outcome letter) decision to dismiss the Claimant on the grounds of gross misconduct. It concluded that, had the Claimant been honest during September to November 2015, the procurement process could have been stopped and it was "entirely feasible that the substantial legal compensation that Camden paid could have been avoided not to mention the adverse publicity of this matter."

57. The panel decided not to uphold the Claimant's appeal and therefore the Claimant remained dismissed.

Submissions

58. Both parties were given the opportunity to address me on the case. The Claimant provided written submissions, which were expanded upon by Counsel. The Respondent's submissions were made orally.
59. In brief, the Claimant drew my attention to the principles in AvB [2003] IRLR 403 in respect of the adequacy of the investigation, requiring more due to the gravity of the charge and their potential effect on the employee. Also, that the investigation should focus no less on potential evidence showing innocence as on evidence showing guilt, particularly when the employee was suspended. In this regard, the Claimant considered that the investigation was very defective in this case. There was no investigation by Ms Connners, who merely reviewed the audit investigation. The Claimant was not shown his 'statement', or the statements of others as part of the investigation. When they were provided they were so heavily redacted to be meaningless.
60. I was referred to Strouthos v London Underground Limited [2004] EWCA Civ 402 to support the proposition that the Tribunal is entitled to take into account length of service and whether the reaction of the Respondent to the conduct was an appropriate one.
61. The Claimant contended that no account was taken that the Claimant had not been trained in relation to the matters he was accused of. He was under monumental stress at the time and that his email requesting not to be a part of the tender process would have been read as such.
62. A reasonable employer would have concluded that there was insufficient evidence of dishonesty and insufficient evidence of gross misconduct. Counsel's opinion was relied upon, without context such that the Respondent unreasonably concluded that the Claimant must have known something suspicious was happening.
63. The Respondent had cherry picked the material it provided and relied upon. Partial information was provided throughout.
64. Finally, there should be no reduction for contribution, since his conduct throughout was not blameworthy. Further, there should be no reduction on Polkey principles, since there was no evidence to conclude that the Claimant would have been dismissed if a fair procedure had been followed.
65. The Respondent submitted that the test in BHS v Burchell had been satisfied. The Claimant wilfully and persistently failed to reveal that confidential price lists had been shared with him. This was not simply a case of forgetfulness, as it was inconceivable that someone with 37 years' considerable experience was

unaware that what he was involved in was a breach of tendering regulations.

66. The Claimant was never accused of fraud or corruption, but dishonesty.
67. The extent of the investigation should be reasonable in all of the circumstances. Here, it was beyond doubt, that the Claimant received the price lists and failed to disclose it.
68. The Claimant did not need to be trained in honesty, nor that he should not have procured rugby tickets during the procurement process.
69. The delay in holding the disciplinary hearing was partly due to the Claimant's illness. However, the Claimant attended the appeal and therefore could have attended the disciplinary hearing or arranged for someone to have done so.
70. There were no flaws in the appeal in any event.
71. Turning to Polkey and contribution. The compensatory award may be reduced to reflect the chance that the Claimant would have been dismissed in any event, and that any procedural errors would have made no difference to the outcome. If the Claimant contributed to his dismissal, the award can be reduced by what is just and equitable. The Respondent contended that the Claimant had contributed to his dismissal by not sharing or coming forward with the information that he had received the prices and not engaging with the internal disciplinary processes at an earlier stage.

LAW

72. I applied the principles established in the case of **BHS v Burchell ([1980] ICR 303, [1978] IRLR 379)**, a case relevant in establishing both the reason for dismissal, but also relevant to the question of whether it was reasonable for the Respondent to treat that reason as a sufficient reason to dismiss in the circumstances under a s 98 (4) ERA. Where the employer suspects misconduct, the Burchell test requires an employer to show that:-
    a. It had a genuine belief that the employee was guilty of misconduct;
    b. It had in mind reasonable grounds upon which to sustain that belief; and
    c. At the time of forming that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.
73. The Tribunal noted that it is not a matter for an employer to conclusively prove the employee's misconduct; it is a matter for the employer to demonstrate that he had reasonable grounds for believing in his guilt.
74. As far as the investigation is concerned, this has to be within the range of reasonable investigations, but the more serious the allegations, the more rigorous the investigation (AvB [2003] IRLR 405). This case also provides that investigations should be carried out in an even handed manner, particularly when the employee has been suspended, where the employer should look for evidence

of innocence as well as evidence of guilt. Mr Justice Elias at paragraph 83 stated:

"*Perhaps of greater significance is the fact that the statements which were taken, and may have been of some assistance to the applicant, were not provided to him. In this context we do not accept that it was sufficient, as was done in relation to some of these statements at least, simply to provide Mr Woolfenden of a précis of what was said. For example, it was not enough, in our view, simply to tell him that Miss B had initially denied the allegations. There was some material in those statements which might have assisted the appellant had they been made available to him."*

75. Additionally at paragraph 86, Elias LJ goes on: *"It is no answer for an employer to say that even if the investigation had been reasonable it would have made no difference to the decision. That is to resurrect the heresy that was first brought to light by the decision of the Employment Appeal Tribunal in British Labour Pump v Byrne [1979] IRLR 4 and which was finally laid to rest by the House of Lords in Polkey v A E Dayton Services Ltd [1987] IRLR 503. If the investigation is not reasonable in all the circumstances, then the dismissal is unfair and the fact that it may have caused no adverse prejudice to the employee goes, at least as the law currently stands, to compensation."*
76. Section 98 (4) ERA: I applied this section to the relevant findings of fact, namely:- *"The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer:-*

    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

    (b) shall be determined in accordance with equity and the substantial merits of the case."
77. In making this determination by applying s 98 (4) ERA I had in mind the essence of the test to be applied; namely, it is not what the Tribunal believes to be reasonable or unreasonable, but the test is whether the Respondent acted within the band of reasonable responses: **Iceland Frozen Foods v Jones** ([1982] IRLR 439 EAT), **London Ambulance Service NHS Trust v Small** ([2009] IRLR 563 CA) and **Sarkar v West London Mental Health NHS Trust** ([2010] IRLR 508).
78. The Tribunal must not therefore substitute its own view for that of the employer.
79. I had regard to section 123(6) ERA which provides:

    "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the*

compensatory award by such proportion as it considers just and equitable having regard to that finding."

80. It is necessary to consider whether:
    a. The claimant's conduct was culpable or blameworthy;
    b. Whether the Claimant's conduct actually caused or contributed to his dismissal; and
    c. Whether it was just and equitable to make any reduction.
81. The case of Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL provides authority for the Tribunal to consider the likelihood that the claimant would have been dismissed in any event and that the employer's procedural errors therefore made no difference.

Conclusion

82. The parties had agreed that the reason for the Claimant's dismissal was conduct, and therefore was for a potentially fair reason. I therefore had to consider fairness in accordance with section 98(4) ERA as set out above.
83. I was satisfied that the dismissing officer, Katherine Robertson, had an honestly held belief in the Claimant's guilt at the time of the dismissal. However, I had serious concerns about the basis for that belief.
84. I consider that the investigation was seriously flawed. The investigation by the audit department was a two-pronged investigation by Mr Cross and Mr Bhania. However, it was clear that no one ever identified to the Claimant that he was himself being investigated for dishonesty or fraud. Whilst there is no need to tell an individual the basis of an investigation, it did mean that by the time of the disciplinary hearing (approximately 2 years after the events for which the Claimant was being disciplined), the Claimant was too ill to attend the disciplinary hearing and therefore, never responded to these allegations. If they had been outlined earlier, it would have given the Claimant the opportunity, closer to the time of the events, to answer the serious allegations put to him.
85. The investigation carried out by Mr Cross had terms of reference, which were not produced to the Tribunal. There were minutes for only one of the five meetings with the Claimant. The statements/ minutes of meetings with others were not provided prior to the Claimant's dismissal or appeal. They were provided once a subject access request was made, and even then, only 2 were provided, which were redacted to such an extent so as to be meaningless. I am still unsure whether Iona Goodchild said anything within her meeting to support the Claimant. I also do not know whether the Claimant's line manager/ work colleagues were questioned concerning the matters which were so serious as to consider dismissing the Claimant after 37 years' service.
86. It was clear that Mr Cross had visited Iona Goodchild at home as part of his

investigation. In cross-examination, Mr Cross stated that there were more substantial specific allegations against Ms Goodchild than against the Claimant. However, there appears to be no substantiated reason as to the failure to even attempt to meet with the Claimant at home concerning allegations, which were ultimately responsible for his dismissal.

87. Even though the Claimant received a copy of this audit report whilst off on long term sick, concerns were raised by his wife over its accuracy prior to the disciplinary hearing, although there was no further communication with the Claimant or his wife to understand what these concerns were.
88. It was clear that the Claimant had provided to Mr Cross the email confirming that he did not wish to be part of the tender process, but this does not appear to have been considered by Katherine Robertson, nor was it raised by Mr Cross. I consider that an employer acting reasonably, would have considered this and the fact of the Claimant's son's accident, catastrophic as it was, at the time when the alleged misconduct took place, in considering whether the Claimant had committed the gross misconduct he was accused of.
89. I am not satisfied that Ms Robertson's adjournment was sufficient to fully explore this, since it focused particularly on whether the Claimant had ever raised concerns that he wasn't coping with his role and the procurement process and whether he requested any other support, rather than considering the effect of the accident on his ability to perform at that material time. No consideration appears to have been given to the Claimant's email asking to not be part of the evaluation team for the tender process for the Contract.
90. The audit investigation report relied upon Counsel's opinion, which was not provided in its entirety. It was impossible to know whether the quotations provided in the audit report were taken out of context or, indeed, whether there was anything else within Counsel's opinion, which might have assisted the Claimant's case.
91. There appears to be an assumption by Katherine Robertson that the Claimant had multiple opportunities to be open and honest about the sharing of pricing information and the actions in amending the final values spreadsheet. However, we do not know what Mr Thornhill was asked during the investigation by legal counsel, since the only notes are those referred to above and Counsel was not called to attend the disciplinary hearing. I do not consider that an employer acting reasonably would have concluded that Mr Thornhill was not open and honest in these circumstances.
92. Also, presumably, Counsel prepared his advice not for the basis of disciplinary action, but rather for the purposes of the civil case being brought against the Respondent by FMC. There appears to have been great reliance placed upon

Counsel's report, although we have not seen it in its entirety, nor know whether the comments extracted from it are taken out of context.

93. The investigation carried out by Ms Conners, cannot truly be called an investigation, since it did nothing further to investigate the contents of the audit report prepared by Mr Cross. Her disciplinary report appeared to merely set out allegations to be put to the Claimant for the purposes of his disciplinary hearing.
94. I do not criticise the Respondent for continuing with the disciplinary hearing in the absence of the Claimant, since at the time of the hearing, it had no idea as to when the Claimant would be in a position to attend a postponed hearing. I also do not consider that this was a breach of natural justice. However, in light of his wife's email dated 14 June 2017, further investigations would have been reasonable and would, in my view, have been carried out by any reasonable employer.
95. As this case involved someone with 37 years' service, who had a clean disciplinary record, other than for one warning given in 2000, I consider that an employer acting reasonably in this case, would have gone further in its investigations, particularly in light of the size and administrative resources of the Respondent and the impact of the dismissal on the Claimant in this case.
96. It appears, although I cannot be sure due to the heavy redaction of key documents, that the Claimant's line manager was not interviewed at the time of the investigation. The list of individuals interviewed as confirmed in the report prepared by Mr Cross is also redacted. The only question which was definitely put to the Claimant's line manager was by Katherine Robertson during the adjournment of the disciplinary hearing. This was limited in the way it was put, and I consider that an employer acting reasonably, would have considered more the impact of the Claimant's son's accident at the time of the Contract tender process, both in relation to what he did at the time, but also, as to his recollection of those events some time later in considering whether the Claimant had committed gross misconduct.
97. I therefore consider that the investigation was seriously flawed and that, as this formed the basis for the dismissal decision and the appeal, which did no further investigation, then the Claimant's dismissal cannot be said to be fair and/or within the range of reasonable responses.
98. No reasonable employer would have come to the conclusion that the Claimant had acted dishonestly and/or had committed gross misconduct in these circumstances. For the reasons set out above, the Claimant's claim for unfair dismissal succeeds.
99. I considered whether the Claimant's conduct had contributed to his dismissal, such that it was just and equitable to reduce any compensation payable to the

Claimant. I do not consider that the Claimant's conduct at the time of the tender process for the Contract was such as to contribute to his dismissal. He was sent pricing by his superior, queried whether he should have received it with his line manager, and was told that as this was not to be shared with others, it was fine. I considered whether the Claimant's failure to recollect that this had taken place amounted to conduct contributing to his dismissal, but, again do not accept that this was blameworthy conduct on the part of the Claimant due to the circumstances prevailing at the time.

100. I do not accept the Respondent's contention that the Claimant's failure to engage in the internal disciplinary process, when there was clear medical evidence that he was unfit to attend any disciplinary hearing, was conduct capable of reducing any award to the Claimant in accordance with section 126(3) ERA. I therefore do not consider that any reduction should be made in the compensation awarded to the Claimant by virtue of any contributory conduct by the Claimant.

101. Turning to Polkey and whether any reduction should be made to reflect the possibility that the Claimant would have been dismissed in any event, I do not award any such reduction. As I consider that the investigation was not within the range of reasonable investigations, it is impossible for me to consider whether the Claimant would have been dismissed in any event, had a proper and reasonable investigation been carried out. I therefore do not consider any reduction appropriate in this case.

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Employment Judge Welch

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Date 10 October 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

10 October 2018

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FOR THE TRIBUNAL OFFICE